Malayan Banking Bhd v Export-Import Bank of Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-2–01 OF 2014
HASNAH HASHIM J
10 FEBRUARY 2015

Contract — Claims — Claim for debt — Parties entered into multi-currency trade finance policy agreement — Defendant provide credit insurance under agreement to protect plaintiff in case of default in payment of facilities by plaintiff's customer — Plaintiff's customer default in payment — Plaintiff claimed credit insurance from defendant — Defendant refused to pay — Whether defendant bound to pay insured percentage of amount loss — Whether defendant could avoid liability due to delay in claim by plaintiff

The plaintiff and the defendant had entered into a multi-currency trade finance policy agreement ('MCTFP') under which the defendant agreed to provide the plaintiff with credit insurance to protect the plaintiff against its customers where certain banking facilities were granted by the plaintiff to its customers. In default of payment by the customer, the defendant would, when a claim was submitted, pay the plaintiff the amount agreed. In the present case, the plaintiff's customer, U-Trend Manufacturing Sdn Bhd ('UTM'), had failed to settle the amount due and owing under banking facilities granted to it by the plaintiff. Consequently, on 16 January 2011, the plaintiff submitted its claim to the defendant for the sum of RM1,943,349.84 pursuant to the MCTFP. However, the defendant refused to pay the sum to the plaintiff, hence this action by the plaintiff. The plaintiff contended that UTM had defaulted in the payment of the banking facilities, thus the defendant was bound by the terms of the policy to provide insurance and having accepted the payment of premium must pay to the plaintiff the insured percentage of the amount loss. It was further submitted that the delay in submitting the claim under the policy by 60 days was not valid reason for the defendant to avoid liability and the time for submission of such claim under the policy was not rigid. In reply, the defendant submitted that the condition precedent of the MCTFP was not fulfilled by the plaintiff. The defendant submitted that the plaintiff had failed: (a) to submit to the defendant all required information and documents as requested; (b) to comply strictly with the defendant's recovery guidelines attached to the MCTFP; and (c) to submit its claim within stipulated time.

Held, allowing the plaintiff's claim with costs of RM20,000:

(1) In the instant case the delay of 60 days was not a good reason to avoid liability. Furthermore, the defendant had by a letter dated 5 June 2013 given its detailed findings on the plaintiff's claim and had given various

reasons for rejecting the claim. The delay of submitting the claim was not one of the reasons relied on by the defendant (see para 11).

(2) No evidence was adduced by the defendant of any delay in the payment of premiums by the plaintiff. The amount paid by the plaintiff was based on the amount financed — 0.18% per month on the amount financed. The amount financed was the amount disbursed to UTM. The plaintiff had also led evidence through its witness, PW1 that the payment of premium was duly paid based on the amount disbursed. The defendant had accepted the premium paid. This evidence was not challenged by the defendant. Thus, based on the documentary evidence, the defendant's reason for rejection based on non-payment of premium was untenable and not supported by any documentary evidence (see paras 23–24).

(3) The plaintiff had complied with all the requirements of s 17 of the MCTFP as well as the recovery guidelines. The plaintiff had given to the defendant all the documents available in its record and based on the documentary evidence; the defendant did not at any time raise the issue of non-compliance of any of the provisions of the said policy. Based on the oral and documentary evidence, there was no basis for the defendant to reject the plaintiff's claim (see para 32).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki perjanjian polisi pembiayaan perdagangan pelbagai mata wang ('MCTFP') di mana defendan bersetuju untuk memberikan plaintif dengan insurans kredit untuk melindungi plaintif terhadap pelanggan-pelanggannya di mana kemudahan perbankan tertentu diberikan oleh plaintif kepada pelanggan-pelanggannya. Dalam keingkaran bayaran oleh pelanggan, defendan akan, apabila tuntutan dikemukakan, membayar plaintif jumlah yang dipersetujui. Dalam kes ini, pelanggan plaintif, U-Trend Manufacturing Sdn Bhd ('UTM'), telah gagal untuk menyelesaikan jumlah yang kena dibayar di bawah kemudahan perbankan yang diberikan kepadanya oleh plaintif. Akibatnya, pada 16 Januari 2011, plaintif mengemukakan tuntutannya kepada defendan bagi jumlah sebanyak RM1,943,349.84 berikutan kepada MCTFP. Walau bagaimanapun, defendan enggan membayar jumlah tersebut kepada plaintiff, maka tindakan ini oleh plaintif. Plaintif berhujah bahawa UTM telah memungkiri dalam pembayaran kemudahan perbankan, oleh itu defendan terikat dengan terma polisi untuk memberikan insurans dan dengan menerima bayaran premium mesti membayar kepada plaintif peratusan yang diinsuranskan terhadap jumlah kerugian. Ia selanjutnya dihujahkan bahawa kelewatan dalam mengemukakan tuntutan tersebut di bawah polisi selama 60 hari bukan alasan sah bagi defendan untuk mengelak liabiliti dan masa untuk pengemukaan tuntutan sedemkian di bawah polisi tidak tegar. Dalam jawapan, defendan berhujah bahawa syarat duluan MCTFP tidak dipenuhi oleh plaintif. Defendan berhujah bahawa plaintif telah gagal: (a) untuk mengemukakan kepada

defendan kesemua maklumat yang dikehendaki dan dokumen seperti yang dipohon; (b) untuk memenuhi secara ketat garis panduan pemulihan defendan yang dilampirkan kepada MCTFP; dan (c) untuk mengemukakan tuntutannya dalam masa yang ditetapkan.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM20,000:

(1) Dalam kes ini kelewatan sebanyak 60 hari bukan alasan baik untuk mengelak liabiliti. Selanjutnya, defendan telah melalui surat bertarikh 5 Jun 2013 telah memberikan dapatan terperinci atas tuntutan plaintif dan memberi pelbagai alasan bagi menolak tuntutan tersebut. Kelewatan mengemukakan tuntutan bukan salah satu alasan yang bergantung oleh defendan (lihat perenggan 11).

(2) Tiada keterangan yang dikemukakan oleh defendan mengenai apa-apa kelewatan dalam bayaran premium oleh plaintif. Jumlah yang dibayar oleh plaintif adalah berdasarkan atas jumlah yang dibiayai — 0.18% sebulan atas jumlah yang dibiayai. Jumlah yang dibiayai adalah jumlah yang dikeluarkan kepada UTM. Plaintif juga membawa keterangan melalui saksinya, bahawa bayaran premium dibayar dengan wajar berdasarkan jumlah yang dikeluarkan. Defendan telah menerima jumlah premium yang dibayar. Keterangan tidak dicabar oleh defendan. Oleh itu, berdasarkan keterangan dokumentar, alasan defendan bagi penolakan berdasarkan atas tidak membayar premium adalah tidak dapat dipertahankan dan bukan disokong oleh apa-apa keterangan dokumentar (lihat perenggan 23–24).

(3) Plaintif telah memenuhi kesemua kehendak s 17 MCTFP dan juga garis panduan pemulihan. Plaintif telah memberikan kepada defendan kesemua dokumen yang ada dalam rekodnya dan berdasarkan keterangan dokumentar; defendan tidak pada bila-bila masa membangkitkan isu ketidakpatuhan terhadap apa-apa peruntukan polisi tersebut. Berdasarkan keterangan lisan dan dokumentar, tidak terdapat asas bagi defendan untuk menolak tuntutan plaintif (lihat perenggan 32).]

Notes

For a case claim for debt, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4147.

Cases referred to

Lam Soon Edible Sdn Bhd v Hup Seng Perusahaan Makanan (M) Sdn Bhd [2010] 4 MLJ 702; [2011] 1 LNS 807, HC (refd)

Sean Yeow (JS Hoi with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.

Karlos Israphil Bendlin (Nur Zahirah Badarudin with him) (Amin Karlos) for the defendant.

Hasnah Hashim J:

[1] The plaintiff and the defendant entered into a Multi-Currency Trade Finance Policy ('MCTFP'). Pursuant to the said agreement the defendant agreed to provide the plaintiff credit insurance to protect the plaintiff against its customers where certain banking facilities were granted by the plaintiff to its customers. In the event the plaintiff's customers fail to pay the amount due and owing under the said facilities, the defendant will, when a claim is submitted, pay the plaintiff the amount agreed.

[2] The plaintiff's claim against the defendant is as follows:

(a) the sum of RM1,943,349.84;

(b) interest on the sum of RM1,943,349.84 at the rate of 5%pa from 15 November 2013 until the date of full settlement;

(c) costs; and

(d) such further and other relief as this honorable court deems fit.

[3] The plaintiff's claim, however, was reduced to RM1,457,620.38.

BACKGROUND FACTS

[4] By a letter of offer dated 2 August 2006 the plaintiff offered and granted to U-Trend Manufacturing Sdn Bhd ('UTM') banking facilities known as Pre-Shipment MCTF amounting to RM2m. The defendant issued the MCTFP endorsement to the plaintiff in relation to the said banking facilities granted to UTM. Pursuant to the terms of the MCTFP endorsement, the defendant shall pay to the plaintiff the insured percentage of the amount of loss in 30 days from the date of submission of the claim subject that all the relevant documents and information in respect of the claim are provided by the plaintiff to the defendant.

[5] UTM failed to settle the amount due and owing under the said banking facilities and the facilities were classified as non-performing loan on 1 November 2007. On 16 December 2011, the plaintiff submitted its claim to the defendant for the sum of RM1,943,349.84. The defendant rejected the plaintiff's claim. By a letter dated 7 November 2013, the plaintiff through its solicitors demanded payment from the defendant. However, the defendant refused to pay the sum to the plaintiff.

THE TRIAL

[6] The case proceeded by way of a full trial with the plaintiff calling one witness and the defendant one witness:

The plaintiff:

Sharifah Rehana bt Syed Osman — PW1

The defendant:

Rahimah bt Abdullah — DW1

THE DOCUMENTS

[7] The documents referred during the trial proceedings are as follows:

(a) bundle of pleadings;

(b) common bundle of documents A1;

(c) common bundle of documents B1;

(d) additional common bundle of documents B2;

(e) additional common bundle of documents B3; and

(f) additional common bundle of documents B4.

THE PLAINTIFF'S CASE

[8] It is the plaintiff's case that the defendant is seeking to avoid the MCTFP. By the said policy, the defendant had agreed to insure a MCTF banking facility of RM2m granted to UTM. UTM defaulted in the payment of the banking facilities. The defendant is therefore bound by the terms of the policy to provide insurance and having accepted the payment of premium must pay to the plaintiff the insured percentage of the amount of loss.

[9] It is the argument of the plaintiff that the delay in submitting the claim by 60 days is not a valid reason for the defendant to avoid liability. It is further submitted that the time for submission of claim under the policy is not rigid. The learned counsel for the plaintiff referred to the case of *Lam Soon Edible Sdn Bhd v Hup Seng Perusahaan Makanan (M) Sdn Bhd* [2010] 4 MLJ 702; [2011] 1 LNS 807 where the issue of delay of submission of claim was considered. The plaintiff in the *Lam Soon*'s case had argued that there is no

specific clause to state that the plaintiff must comply with clause 13(i)(b) before policy liability is engaged. A mere delay of 29 days in submitting the statement of overdue account does not entitle the defendant to decline the claim. The High Court in that case held that the clauses relied on by the defendant to deny liability cannot stand as condition precedent taking into consideration the intention of the parties as stated in the policy terms per se read as a whole:

> In my view the clause itself gives room for the defendant to honour the claim notwithstanding the claim was not made within time. In consequence it cannot be said the time stated therein is rigid. In addition the plaintiff has given 'Notification of Probable Loss' — see Exhibit CMS 5 p 2, within the 18 month period. In the case of Tetuan Baker & Partners even though the notification of claim was issued by the insured in a form of a letter of reply (rather than a formal notification), the court construed that the letter constitutes a notification of claim to the Insurer. I agree with the submission of the learned counsel for the plaintiff that the Notification of Probable Loss, even though not the Claim Form, would clearly constitute a notification of 'intended claim' by the Plaintiff pursuant to Clause 1(e).
>
> ... In my view the defendant cannot avoid liability on this ground. In addition the learned counsel for the plaintiff in reliance of Exhibit CMS 3 says that there was no delay in payments of the premium as the premiums were paid within 14 days from the date of the invoice from the defendant. In addition relies on the book titled. 'The Principles of Insurance Law' by Poh Chu Chai at pp 340–341 which states that an insurer who continues to receive premiums from an insured after he becomes aware of the insured's breach of contract is estopped from relying on the breach of condition. And asserts that despite delay (which is not admitted) in payment of premium the insurance policy was automatically renewed by the defendant. In addition relies on schedule 1 of the Insurance Policy see Exhibit AA-1) paragraph 2, it is clearly stated that the policy will be automatically renewed unless either party notifies the other in writing not less than 30 days prior to the date of termination.

[10] The decision of the High Court in *Lam Soon*'s case has been unanimously affirmed by the Court of Appeal and leave to appeal was refused by the Federal Court.

[11] In the instant case the delay of 60 days is not a good reason to avoid liability. Furthermore, the defendant had by a letter dated 5 June 2013 given its detailed findings on the plaintiff's claim and had given various reasons for rejecting the claim. The delay of submitting the claim was not one of the reasons relied on by the defendant.

[12] It is submitted that there is documentary evidence that the amount disbursed by the plaintiff to UTM is RM1,943,349.84. The premium payable by the plaintiff to the defendant under the policy is based on the amount disbursed by the plaintiff to UTM. The plaintiff has paid the defendant the

required premium for the amount disbursed.

THE DEFENDANT'S CASE

[13] The defendant, however, denies total liability to the plaintiff's claim as the plaintiff had failed to comply strictly with certain express terms and conditions of the MCTFP. It is the defendant's case that the condition precedent was not fulfilled by the plaintiff. The plaintiff failed to do the following:

(a) submit to the defendant all required information and documents as requested;

(b) the plaintiff failed to comply strictly to the defendant's recovery guidelines attached to the MCTFP as stipulated under section 17.04; and

(c) the plaintiff failed to submit its claim within the stipulated time.

ISSUES FOR DETERMINATION

(a) whether the plaintiff submitted the claim late; and

(b) the actual amount disbursed by the plaintiff.

FINDINGS AND DECISION

[14] Section 17 of the policy provides as follows:

> 17.01 Subject to section 17.04, the BANK may submit claims for payment under this Policy in writing in the prescribed form provided that:
>
> (a) EXIM is notified within thirty days from the due date of payment that the same is overdue, and
>
> (b) the BANK has issued a legal notice of demand to recover the debt from the EXPORTER and all guarantors not later than 180 days from the NPL date; and
>
> (c) the BANK has exhausted legal and enforceable procedures to recover the Insured Debt from the EXPORTER and all guarantors; and
>
> (d) the amount of loss in respect of the Insured Debt was filed by the BANK with the official liquidator of the EXPORTER where an order for compulsory winding up of the EXPORTER has been passed by a competent court of law in Malaysia; or
>
> (e) a claim in respect of the Insured Debt was filed and registered by the BANK with liquidator of the EXPORTER, such EXPORTER having passed an effective resolution for voluntary winding up, and

(f) the BANK has obtained an order of adjudication passed by a competent court of law in Malaysia upon a petition presented by the BANK for insolvency or bankruptcy of all the guarantors under the BANK's Multi-Currency Trade Finance Facility Agreement.

17.02 For payment of claims for credits and/or advances made in Foreign Currency, the Ringgit value shall be based on the BANK's exchange rate on the date of the actual disbursement of the credits and/or advances of the contracted forward exchange rate, as the case may be.

17.03 Subject to the fulfillment of each and every requirement in Section 17, and without prejudice to the other terms and conditions of this Policy, EXIM shall pay to the BANK the Insured Percentage of the Amount of Loss within thirty days from the date of submission of claims by the BANK provided all available information and documentation on the claim are made available to EXIM by the BANK.

17.04 In any case, EXIM shall pay all claims to the BANK not later than (4) four years from the Due Date of payment from the EXPORTER provided that the BANK has complied strictly with EXIM's Recovery Guidelines as annexed hereto.

17.05 Any payment under section 17.04 by EXIM shall be subject to the BANK giving a written undertaking to EXIM that the BANK has to the best of its knowledge, taken all reasonable legal process against the EXPORTER or done any act whereby its claim may be rejected by the court.

[15] Under section 17.01, the plaintiff must notify the defendant within thirty days from the due date of payment that the payment is overdue. The term 'due date' for the purpose of part 1 is defined as 'the date fixed by the bank for the repayment of the insured debt by the EXPORTER or such extended date, or where a credit has been granted as repayable on demand, the date on which the bank demands repayment of the insured debt in writing from the EXPORTER'. The exporter under the said policy is UTM.

[16] The plaintiff had sent a notice dated 1 October 2007 (p 151 B) to UTM that the letter of credit ('LC') financed by the MCTF had expired and that UTM is to effect payment. By the aforesaid letter, the plaintiff would have complied with the requirement of section 17.01 as the letter was also copied to the defendant. Subsequently, by a notice dated 6 March 2008, the plaintiff through its solicitors issued a demand to UTM for the amount disbursed. The plaintiff then by a letter dated 16 December 2011 (refer p 215 B) to the defendant submitted its claim form as required by the terms of the policy.

[17] Based on the plaintiff's records, there are two letters of credit financed by the plaintiff in respect of the MCTF banking facility insured by the defendant. The total amount advanced to UTM is RM1,943,493.84. The plaintiff's witness, PW1, in her witness statement told the court that the letter of reminder dated 1 October 2007 had expressly stated the reference of the letter of credit ('LC'). Unfortunately, the plaintiff was unable to retrieve any

other letter of reminders in relation to the other LCs. However, she explained that the monthly statement of account as at 31 October 2007 (p 9 B2) shows the two LCs with the reference number with the corresponding amount.

[18] The plaintiff submitted its claim form as required pursuant to section 17 of the policy. Following the submission of the said form, there were correspondences exchanged between the parties. The defendant, by a letter dated 27 December 2011, requested for further documents to evaluate the claim submitted:

(i) Maybank's internal recovery guideline;

(ii) MCTF Policy signed between Export-Import Bank of Malaysia Bhd and Malayan Banking Bhd;

(iii) Facility Agreement between Maybank and U-Trend Industries Sdn Bhd & U-Trend Manufacturing Sdn Bhd;

(iv) Guarantee Agreement between Maybank and the Guarantors of U-Trend Industries Sdn Bhd & U-Trend Manufacturing Sdn Bhd;

(v) Letters of Credit and other supporting export documents including the application for drawdown from the Exporter; and

(vi) Monthly declaration made, premium payment evidence and etc.

[19] The documents were then submitted to the defendant vide a letter dated 3 February 2012 (was signed by PW1). The defendant, by a letter dated 22 February 2012 (p 222 B), requested for further documents:

Malayan Banking Bhd
Remedial/Asset Reconstruction 2
Corporate and Remedial Management
44th Floor Menara Maybank
100 Jalan Tun Perak
50050 Kuala Lumpur.
Attn: Sharifah Rehana Syed Osman
Account Manager, Remedial/Asset Reconstruction 2
Dear Sir,
Policyholder: Malayan Banking Bhd ('Maybank')
Policy: EXIM-MCTFP-MBB-0016/06
Exporter: U-Trend Manufacturing Sdn Bhd

Claim Submission against U-Trend Manufacturing Sdn Bhd amounting to RM1,943,439.84 under Multi-Currency Trade Finance Policy (MCTFP).

Reference is made to your letter dated 03/02/12 and the email correspondences dated 09/02/12, 17/02/12 and 20/02/12 with regards to the above matter.

We have verified all documents submitted via your letter dated 03/02/12 and regret to inform you that the information is insufficient to enable us to make decision on policy liability. Thus, in order for us to examine your claim fully, please submit the following further information and/or documents to us immediately:

i. Letter of Credit, export documents, drawdown documents (for your information, we do not received these documents as mentioned by you in the e-mail correspondence dated 17/02/12;

ii. 2nd and 3rd Letter of Reminder;

iii. Statement of Overdue; and

iv. Pre-Shipment Facility Limit Endorsement (Pre-Shipment MCTF) for Policy Period 01/07/07 – 30/06/08 for Exporter, U-Trend Manufacturing Sdn Bhd.

Please send to us the above documents soonest possible and please also be advised that we are acting without prejudice and without admission of liability. We reserve the right to ask for further information and/or documents should the information and documents you submit later require further clarification.

Yours faithfully

EXPORT-IMPORT BANK OF MALAYSIA BERHAD (357198-K)

.....

SHAHRIR MASDUKI

Head

Special Asst Management Department.

[20] The defendant then sent another letter dated 3 December 2012 requesting for the copy of the original letter of credit (refer p 224 B). The plaintiff then informed the defendant vide a letter dated 6 December 2012 (refer p 225 B) that they were unable to locate the documents requested. The defendant then notified the plaintiff by a letter dated 5 June 2013 that they had rejected the claim based on the extent of the documents submitted. The detailed findings stated in the said letter is as follows:

Export-import Bank of Malaysia Bhd (EXIM Bank) has examined your claim based on the extent of documents submitted by you in respect of the claim, EXIM Bank's detailed findings are as follows:

i. Section 8 — Premium Payment

Maybank was late in making the premium payment for each of the drawdown made. Pursuant to Section 8 of the MCTF Policy, the premium due under the

policy shall be paid of EXIM Bank not later than fifteen business days of each calendar month in respect of LCs lodged in the previous month.

ii. Section 17.01 and 17.03 — Claims Procedure and Payment

Maybank has failed to exhaust all legal enforceable procedures to recover the insured debt from the Exporter. EXIM Bank has not sighted any evidence of Maybank having lodged the proof of debt in respect of the insured debt with the official liquidator pursuant to the winding-up of the Exporter.

iii. Despite numerous by EXIM Bank, Maybank has also failed to provide all relevant documents in support of its claim to EXIM Bank as required under the MCTF Policy. Including but not limited to documentary evidence of actual amount disbursed by Maybank under the facility concerned such as the Letter of Credit and supporting export documents.

The failure of Maybank to provide the documents requested is a non-compliance of Section 17.03 of the MCTF which states that subject to fulfillment of all requirements in Section 17, EXIM shall pay to Maybank the insured percentage of the amount of loss provided all available information and documentation on the claim are made available to EXIM Bank by Maybank.

iv. Section 17.04 — Claims Procedure and Payment

Section 17.04 of the MCTF Policy provides that EXIM Bank shall pay Maybank's claim only if Maybank has complied strictly with EXIM's Recovery Guidelines. However, Maybank has failed to comply with EXIM's Recovery Guidelines as no documentary evidence was submitted to EXIM Bank to show that the following recovery procedures have been strictly complied with by Maybank:

(i) Steps taken to freeze further drawdown of the facility by U-Trend Manufacturing (timeline: 3 banking days after expiry of LC).

(ii) 2nd Reminder Letter (timeline: 10 banking days after expiry of LC).

(iii) Final Reminder Letter (timeline: within 30 days after expiry of LC).

(iv) Notification on the Overdue Amount (timeline: within 30 days after expiry of LC).

v. Section 19 — Declaration of Export

a) Declaration of Export

Maybank has failed to submit the total credits and advances outstanding at the end of the preceding month for each Pre-shipment facility limit endorsement in force and all extension of the original due dates of payment on or before the 15th day of every month commencing from the date of the policy to EXIM Bank.

In addition, Maybank is obliged to continue submitting the declaration to EXIM Bank until all the insured credits/or advances have repaid in full or up to the month in which a claim is lodged with EXIM Bank. However, Maybank has failed to perform its obligation.

Section 42 of the MCTF policy states that the failure by Maybank to comply with any terms and conditions of the MCTF policy shall not be deemed to be excused or accepted by EXIM Bank. Based on the foregoing, we regret to inform you that Maybank's claim under the MCTF Policy is rejected by EXIM Bank.

[21] Section 12 of the aforesaid policy expressly provides that the defendant agrees to indemnify the plaintiff against the insured percentage of the amount of loss in connection with any insured debt to which the policy applies due to the failure of UTM to pay by reason of insolvency. Section 16 of the said policy further provides that the defendant shall not be liable for loss if the plaintiff fails to submit a claim in writing in the prescribed form within six months from the date of fulfillment of the condition set out in section 17. In the instant case, the plaintiff had submitted its claim according to the prescribed form as stipulated on 16 December 2011. The defendant rejected the claim not due to delay in submitting the claim but for other reasons as set out in its letter dated 5 June 2013.

[22] It is the defendant's contention that the plaintiff was late in making the premium payment for each of the drawdown made. Pursuant to section 8 of the MCTF policy, the premium due under the policy shall be paid to EXIM Bank not later than fifteen business days of each calendar month in respect of LCs lodged in the previous month.

[23] However, no evidence was adduced by the defendant of any delay in the payment of premiums by the plaintiff. The amount paid by the plaintiff is based on the amount financed — 0.18% per month on the amount financed. The amount financed is the amount disbursed to UTM. Similarly, in the *Lam Soon Edible Oils*'s case, there was no delay in payments of the premium by the plaintiff and the High Court held that by the construction of the terms of the policy, the plaintiff is entitle to the payment.

[24] The plaintiff has also led evidence through PW1 that the payment of premium was duly paid based on the amount disbursed. The defendant had accepted the premium paid. This evidence was not challenged by the defendant. Therefore, based on the documentary evidence, the defendant's reason for rejection based on non-payment of premium is untenable and not supported by any documentary evidence.

[25] The defendant argued that the plaintiff failed to exhaust all legal enforceable procedures to recover the insured debt from the exporter. The defendant has not sighted any evidence of the plaintiff having lodged the proof of debt in respect of the insured debt with the official liquidator pursuant to the winding up of the exporter as provided by sections 17.01 and 17.03 of the policy.

[26] Section 17.01 stipulates that subject to section 17.04, the plaintiff may submit claims for payment under this policy in writing in the prescribed form provided that:

(a) the defendant is notified within thirty days from the due date of payment that the same is overdue, and

(b) the plaintiff has issued a legal notice of demand to recover the debt from the UTM and all guarantors not later than 180 days from the non performing loan ('NPL') date; and

(c) the plaintiff has exhausted legal and enforceable procedures to recover the insured debt from the UTM and all guarantors; and

(d) the amount of loss in respect of the insured debt was filed by the plaintiff with the official liquidator of the UTM; or

(e) a claim in respect of the insured debt was filed and registered by the plaintiff with liquidator of the UTM having passed an effective resolution for voluntary winding up, and

(f) the plaintiff has obtained an order of adjudication passed by a competent court of law in Malaysia upon a petition presented by the bank for insolvency or bankruptcy of all the guarantors under the bank's multi-currency trade finance facility agreement.

[27] Section 17.04 of the same policy provides that '... In any case, EXIM shall pay all claims to the BANK not later than four years from the due date of payment from the EXPORTER provided that the BANK has complied strictly with EXIM's recovery guidelines as annexed hereto'.

[28] The recovery guidelines stipulates as follows:

RECOVERY GUIDELINES
(for Pre-shipment MCTF)

Cumulative Period of Overdue	Action By Participating Banks/EXIM
3 banking days after expiry of export LC	1. Freeze further drawdown on the Direct Exporter concerned. 2. Send 1st Reminder (Attachment A) to Direct Exporter (c.c. to EXIM).
10 banking days after expiry of export LC	Send 2nd Reminder (Attachment B) to Direct Exporter (c.c. to EXIM).
Not later than 30 days after expiry of export LC	1. Send Final Reminder (Attachment C) to Direct Exporter (c.c. to EXIM). 2. Notify EXIM as per Attachment D.
Not later than 180 days after expiry of export LC	1. Issue Legal Notice of Demand against the Direct Exporter and all guarantor(s).

	2. Proceed with legal action to recover the outstanding balance under the Pre-Shipment MCTF from Direct Exporter and guarantors.
Not later than 4 years after expiry of export LC	The Bank shall submit their claim as per Attachment E to EXIM and EXIM shall pay the Insured Debt if: 1. The Direct Exporter and guarantor(s) are deemed insolvent under the Policy; or 2. The Bank has initiated legal enforceable procedures to recover the Insured Debt from the Direct Exporter and guarantor(s), and the Bank has complied strictly with these Guidelines; and The Bank has given a written undertaking to EXIM that the Bank has, to the best of its knowledge, taken all reasonable legal process against the EXPORTER and has not done any act whereby its claim may be rejected by the Court.

[29] Section 17.03 reads as follows:

> Subject to the fulfillment of each and every requirement in section 17, and without prejudice to the other terms and conditions of this Policy, EXIM shall pay to the BANK the Insured Percentage of the Amount of Loss within thirty days from the date of submission of claims by the BANK provided all available information and documentation on the claim are made available to EXIM by the BANK.

[30] PW1 told this court that the plaintiff did not obtain judgment against UTM and the guarantors. This was because in the midst of the legal proceedings, UTM was wound up by another creditor on 28 September 2007. The plaintiff did not file a proof of debt against UTM as there was no amount due at the time of the winding up. The amount became due only on 1 October

2007 and a letter of reminder was issued. The claim was subsequently submitted in December 2011.

[31] I find PW1 to be a credible and reliable witness who knows the facts and the background of the claim in detail as she was the officer supervising the recovery of the amount owing under the MCTF banking facility granted to UTM. She has been in the plaintiff's employment for nearly 23 years and gave evidence from her own experience dealing with the claim as well as based on documentary records.

[32] Therefore, it is my considered view that the plaintiff has complied with all the requirements of section 17 as well as the recovery guidelines as stated above. The plaintiff has given to the defendant all the documents available in its record and based on the documentary evidence, the defendant did not at any time raise the issue of non compliance of any of the provisions of the said policy. Despite having extended the supporting documents, the defendant rejected the plaintiff's claim as stipulated in the letter dated 5 June 2013.

[33] Based on the evidence, both oral and documentary, I find no basis for the defendant to reject the claim of the plaintiff.

THE DELAY

[34] It is submitted by the plaintiff that the delay of 60 days is not a valid reason for the defendant to avoid liability. Under the said policy there is no time prescribed for submitting a claim. There is however a time prescribed for the payment of the claim. Section 17.04 of the policy provides that the defendant shall pay all claims to the bank not later than four years from the due date of payment from the exporter. This is also expressly stated in the recovery guidelines.

CONCLUSION

[35] In coming to a decision in this case, the court has carefully weighed the evidence adduced by all parties, scrutinised the documents tendered and relied on by the parties as well as considered the written submissions filed by them. On considering the evidence as a whole especially the evidence of all the plaintiff's witness vis a vis the pleadings, and that of the defendant, I am of the considered view that the plaintiff has proven its case on a balance of probabilities against the defendant. Accordingly based on the reasons mentioned above, this court allowed the plaintiff's claims against the defendant with costs. After submission by counsels on costs, I awarded costs of RM20,000 for the plaintiff.

The plaintiff's claim allowed with costs of RM20,000.

Reported by Dzulqarnain Ab Fatar